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## SUPPORT ORDERS, CHURCH COURTS, AND THE RULE OF *FILIUS NULLIUS*: A REASSESSMENT OF THE COMMON LAW

R. H. Helmholz \*

IN 1973 the United States Supreme Court held that a state violated the equal protection clause by denying illegitimate children a right to parental support granted to legitimate children.<sup>1</sup> Commentators have regarded that decision as a worthy departure from the common law rule that denied illegitimate children any right to support from their father. But, as those commentators have noted, the decision simply forbade discrimination between legitimate and illegitimate children.<sup>2</sup> It stopped short of granting an absolute right to support. It did not challenge the widespread American rule, based on English common law, that in the absence of statute an illegitimate child has no inherent right to parental support.

This article suggests that the approach of the American courts rests on a misreading of the historical evidence. Admittedly, the treatment of illegitimates at English common law is well established. "The common law of England," concludes a leading contemporary authority, "was ruthless in its denial of any rights to children born out of wedlock."<sup>3</sup> He merely repeats what every case,<sup>4</sup> every treatise,<sup>5</sup> and every law review article<sup>6</sup> states. The

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<sup>1</sup> See *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

<sup>2</sup> See, e.g., Margolin, *Family Law; Rights of Illegitimate Children*, 1973/1974 ANN. SURVEY AM. L. 233, 245-46; Shaw & Kass, *Illegitimacy, Child Support, and Paternity Testing*, 13 HOUSTON L. REV. 41, 45 (1975).

<sup>3</sup> 1 S. SCHATKIN, *DISPUTED PATERNITY PROCEEDINGS* § 1.08, at 1-27 (4th ed. rev. 1975).

<sup>4</sup> See, e.g., *Baugh v. Maddox*, 266 Ala. 175, 95 So. 2d 268 (1957); *Schneider v. Kennat*, 267 App. Div. 589, 47 N.Y.S.2d 180 (1944); *Butcher v. Pollard*, 32 Ohio App. 2d 1, 5, 288 N.E.2d 204, 207 (1972); Annot., 30 A.L.R. 1069 (1924).

<sup>5</sup> See, e.g., P. BROMLEY, *FAMILY LAW* 592-93 (5th ed. 1976); H. CLARK, *LAW OF DOMESTIC RELATIONS* § 5.1, at 155 (1968); W. HOOPER, *THE LAW OF ILLEGITIMACY* 135-36 (1911); J. MADDEN, *HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS* § 105, at 348 (1931).

bastard was *filius nullius*, a child without rights. According to traditional thought, only the passage of the Elizabethan Poor Law in 1576,<sup>7</sup> when the burden of supporting illegitimate children from parish funds had grown too great for men to bear with equanimity, fastened an obligation to support on the father. That statute, moreover, never formed part of the common law received by American courts. A strictly penal measure, meant rather to preserve parish funds than to protect infants, it allegedly left intact the fundamental proposition that the bastard was *filius nullius*.<sup>8</sup>

Initially, this proposition should arouse suspicion. The society that spawned the common law admitted no great disjunction between the teachings of morality and the dictates of law; and the duty to care for one's child, legitimate or not, was a part of the moral teaching of the time. This duty was enjoined on men by natural law.<sup>9</sup> The country that gave birth to the common law was also ruled by a succession of kings descended from an illegitimate sire.<sup>10</sup> American courts and commentators should have been skeptical of the proposition that such a society cast no enforceable obligation on the parent to care for his newly born infant.

In fact, the proposition is mistaken. The illegitimate child had an enforceable support right prior to 1576. True, the common law itself did not provide an action against the father of a bastard child. But the obligation to support was enforced in the courts of the English Church. The common law's apparent neglect of the child indicates only the jurisdictional boundary between the courts of Church and State, not a disregard of the illegitimate child.

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<sup>6</sup> See, e.g., Stone, *Illegitimacy and Claims to Money and Other Property: A Comparative Study*, 15 INT'L & COMP. L.Q. 505, 507-08 (1966); Note, *Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859 (1966); 6 BAYLOR L. REV. 520 (1954).

<sup>7</sup> 18 Eliz. 1, c. 3 (1576).

<sup>8</sup> See I I. PINCHBECK & M. HEWITT, *CHILDREN IN ENGLISH SOCIETY* 206-14 (1969); Robbins & Deák, *The Familial Property Rights of Illegitimate Children: A Comparative Study*, 30 COLUM. L. REV. 308, 316-19 (1930).

<sup>9</sup> Thomas Aquinas echoes the same Roman law text used by the canonists to show that the care of one's offspring is part of natural law. T. AQUINAS, *SUMMA THEOLOGIAE* 1a2ae.94,2 (28 Blackfriars ed. 83). See also text accompanying notes 18-20 *infra*. The right to existence and upbringing must, of course, be distinguished from the right to inherit from the parent.

<sup>10</sup> 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 397 (2d ed. reissued 1968).

Proof of this assertion must rest in an examination of the canon law enforced in the English ecclesiastical courts.<sup>11</sup> This territory is unfamiliar for the legal historian as well as the lawyer. It calls for an investigation of proceedings not treated by most texts. But the development of the common law rules regulating domestic relations cannot be understood without it. Justice in England was not a unitary matter. Merchant courts, borough courts, and ecclesiastical courts all exercised jurisdiction over matters not covered, or only partially covered, by the royal courts. Whatever conflicts might have arisen among the various courts, all men assumed that each tribunal would carry out part of the total task of regulating men's behavior. Marriage, probate, and defamation, for example, all belonged to the jurisdiction of the ecclesiastical courts.<sup>12</sup> No one disputed this allocation. As this article will show, enforcement of a father's duty to support his illegitimate child also fell within the purview of the canon law. Only in this restricted sense did the common law deny the illegitimate child the support of his father.

## I. THE CANON LAW

The law of the Western Church required the father to support his child, even if the child were born out of wedlock. The duty is a notable example of the twin influences of humanity and Christianity on the law. Classical Roman law had imposed no obligation on the father; the regime of *patria potestas* allowed him the power of life and death over any of his offspring.<sup>13</sup> Imperial legislation softened this regime by requiring the father to support children born of legitimate marriage or of the recognized Roman form of

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<sup>11</sup> In medieval England, every bishop and every ecclesiastical dignitary kept a regular court of law, in which his officials administered the canon law. These courts had jurisdiction over both clergy and laity, they met approximately every three weeks in regular session, and the main courts were staffed by professionally trained lawyers and judges. There were, in other words, few places in England without contact with the legal system of the Church. For a good description of the courts of one English diocese, see B. WOODCOCK, *MEDIAEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY* (1952).

<sup>12</sup> S. MILSON, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 13-15 (1969).

<sup>13</sup> W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 103 (3d ed. rev. 1963). The scholarly literature on the subject in Roman law is extensive, and not free from disagreement. Two fairly recent articles containing reference to earlier literature are Lanfranchi, *Ius exponendi e obbligo alimentare nel diritto romano classico*, 6 *STUDIA ET DOCUMENTA HISTORIAE ET IURIS* 5 (1940) and Zoz, *In tema di obbligazioni alimentari*, 73 *BULLETTINO DELL' ISTITUTO DI DIRITTO ROMANO* 323 (1970).

concubinage.<sup>14</sup> But even under Justinianic law, the father had no duty to support spurious children.<sup>15</sup> That duty was added by medieval canon law. Pope Clement III's decretal letter setting forth the obligation was later incorporated into the Gregorian *Decretals* (1234), thereby becoming a standard text for the courts of the Western Church.<sup>16</sup> Parents had to furnish the necessities of life to all their children, according to the standard their means allowed. Even the child born of fornication or adultery had the right to this basic protection.

The medieval canonists and civilians who treated the question did not undertake as detailed and thoughtful an analysis of the support obligation as did the jurists of the 17th and 18th centuries.<sup>17</sup> But many canonists pointed out the distinction between Roman and canon law. They justified the latter as superior. Hostiensis (d. 1271), for example, distinguished the canon law rule from the "rigor and severity of the secular laws, . . . which nature neither moves nor softens." Children, he wrote, "are always to be nourished, according to the benevolence and equity of the canon law, natural law being considered."<sup>18</sup> Antonius de Butrio (d. 1408) defended canonical usage on several grounds: "And note that the Church intrudes itself into [questions of] providing sustenance to a son, and this because of the sin against the instinct of nature, or when

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<sup>14</sup> See 3 B. BIONDI, *IL DIRITTO ROMANO CRISTIANO* 290 (1954); 1 P. BONFANTE, *CORSO DI DIRITTO ROMANO: DIRITTO DI FAMIGLIA* 379 (1963).

<sup>15</sup> NOV. 89.15.pr. This text, from the Novels of Justinian, can be found in 3 *CORPUS IURIS CIVILIS* (T. Mommsen, P. Krüger, R. Schoell, & G. Kroll eds. 1911). There is a translation of the entire corpus of Roman law in *THE CIVIL LAW* (S. Scott trans. 1932).

<sup>16</sup> X 4.7.5 (2 *CORPUS JURIS CANONICI*, col. 688 (A. Freidberg ed. 1879)). A modern commentary which recognizes this in passing is Ayer, *Legitimacy and Marriage*, 16 *HARV. L. REV.* 22, 23 (1902).

<sup>17</sup> Compare, e.g., BARTOLUS (d. 1357), *COMMENTARIA AT DIGEST* 25.3.5.17, no. 1 (1580-81), with H. GROTIUS (d. 1645), *DE IURE BELLI ET PACIS* lib. 2, c. 7.4 (1646). Canonists were the academic writers on the law of the Church, civilians on the Roman (civil) law. For the most part their writing consisted of commentaries on the formal rules and enactments of the two laws. Perhaps because both canon and Roman law were based on official texts, rather than the system of case law precedent familiar to a modern American lawyer, the academic writers exerted a substantial influence over both court practice and legal education. For an introduction to the subject, see J. CLARENCE SMITH, *MEDIAEVAL LAW TEACHERS AND WRITERS: CIVILIAN AND CANONIST* (1975).

<sup>18</sup> *LECTURA IN LIBROS DECRETALIU* at X 4.7.5, no. 10 (1581): "*Solutio: illud secundum rigorem et subtilitatem legum secularium, ut ibi., quem nec natura movet nec mitigat, nam secundum benignitatem et aequitatem iuris canonici semper alendi sunt, considerato iure naturali.*"

[sustenance] is denied for want of marriage, or when the Church fills a gap in the secular forum.”<sup>19</sup> For him, like most canonists, the principles of equity and benevolence supplied sufficient reason to justify the canon law’s deviation from the harsh Roman law rule.<sup>20</sup>

The divergence between the two forms of law, on the other hand, did not prevent the canonists from using the Roman law to justify and define the nature of the support obligation. They cited texts from the *Institutes*, *Code*, and *Digest*, virtually the whole of the Roman law, to show that natural law imposed a duty on all parents to nurture and support their children. They also borrowed the standards for determining the amount of support, for fixing the duration of the obligation, and for settling the means of proving paternity from the civil law. They saw no incongruity in using Roman law texts to shape an obligation towards illegitimate children, an obligation that Roman law itself denied.<sup>21</sup> This habit was not peculiar to paternity proceedings. It is found throughout medieval canon law.<sup>22</sup> This canonical borrowing, however, does highlight the often overlooked influence of the civil law upon English family law. Roman law, enforced first in the Church courts, later in the royal courts, helped to define the reach of the obligation to support.

The obligation to support adopted by the medieval canonists was a more extensive obligation than English or American law was to enforce subsequently. The duty was, in the first place, a

<sup>19</sup> COMMENTARIA IN LIBROS DECRETALIUUM at X 4.7.5, no. 6 (1578): “*Et nota quod super alimentis filio administrandis se intromittit ecclesia; et hoc propter peccatum contra instinctum naturae, vel quando denegantur propter defectum matrimonii, vel quando ecclesia supplet defectum fori secularis.*”

<sup>20</sup> See also BALDUS, COMMENTARIA at CODE 6.61.8.4d (1586): “*Hic dicitur quod pater debet alere filium non ratione ususfructus, sed ratione ipsius naturae . . . , quod est notabile dictum.*” (“Here it is said that a father should support a son not by reason of [the son’s] usefulness, but because of nature itself, which is a noteworthy statement.”).

<sup>21</sup> A clear example of this use of Roman law is the medieval *glossa ordinaria* at X 4.7.5 s.v. *secundum facultates*. Three principles are laid down: 1) that the support should be given according to the resources available, 2) that the child should be sustained with the mother before the age of three, after that with the father, and 3) that the obligation was reciprocal. The gloss supports all three points with citations from Roman law, principally from sections of DIGEST 25.3.

<sup>22</sup> See generally Kuttner, *Somè Considerations on the Role of Secular Law and Institutions in the History of Canon Law*, 2 SCRITTI DI SOCIOLOGIA E POLITICA IN ONORE DI LUIGI STURZO 349 (1953); Naz, *Droit romain*, 4 DICTIONNAIRE DE DROIT CANONIQUE 1502 (1949).

reciprocal one. Parents must support their children. Children must also support their parents.<sup>23</sup> Need and ability were the determinants. The duty also extended beyond parent and child. Grandparents, even aunts and uncles, could be required to support a child if the primary sources of support, the natural parents, were too poor.<sup>24</sup> The rights and duties of members of a family went a good deal further than they do today. The father's duty to nourish his illegitimate child was only one part of a much broader obligation.

## II. THE ECCLESIASTICAL REMEDY

So much, of course, is only theory. The English Church courts did not put into practice every part of the medieval canon law.<sup>25</sup> If the duty of support were one of the parts they omitted, then the common law really did ignore the plight of the illegitimate child. Evidence of the conformity of English practice with medieval canon law must come from the contemporary Church court records.<sup>26</sup> Those records, unfortunately, are not easy to use or to

<sup>23</sup> See, e.g., HOSTIENSIS, *LECTURA* at X 4.7.5, nos. 7-9.

<sup>24</sup> See BARTOLUS, *COMMENTARIA* at DIGEST 25.3.1 § *Item rescriptum*, no. 2; G. DURANTIS, *SPECULUM IUDICIALE* IV, tit. *qui filii sint legitimi*, no. 6; Joannes Andreae, *COMMENTARIA* at X 4.7.5, no. 7 (1581).

<sup>25</sup> See, e.g., Donahue, *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined After 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647, 660-64 (1974).

<sup>26</sup> These records, which are today kept in county and diocesan archives throughout England, are the basis of this article. The majority of the records which once existed has been lost over the course of the centuries, but the author has examined most of the surviving medieval and a large sample of the remaining 16th century records. Citation to these sources is given hereinafter by diocese. Those used, with corresponding modern archive, are as follows:

Canterbury	Library of the Dean and Chapter, Canterbury.
Chichester	West Sussex Record Office, Chichester.
Durham	Library of the Department of Palaeography and Diplomatic, University of Durham.
Hereford	Hereford County Record Office, Hereford.
Lichfield	Joint Record Office, Lichfield.
London	Guildhall Library, London [MS. 9064 records] and Greater London Council Record Office [DL/C records].
Norwich	Norfolk Record Office, Norwich.
Rochester	Kent County Record Office, Maidstone.
St. Albans	Hertfordshire Record Office, Hertford.
York	Borthwick Institute of Historical Research [Cause Papers and A B Act Books] and York Minister Library [M 2(1) Act Books].

interpret.<sup>27</sup> They survive in limited quantities, and the scribal habits of recording in the Act books often conceal more about the details of litigation than they reveal. Nevertheless, the available evidence is clear enough to show that the courts did enforce the obligation to support illegitimate children. The Act books demonstrate that the duty was not mere canonical theory.

Litigated cases imposing support obligations came before the Church courts in two ways: petitions by the mother on behalf of the child,<sup>28</sup> and prosecutions *ex officio* for fornication or adultery resulting in the birth of a child.<sup>29</sup> Either type of dispute could give rise to a support order entered against the putative father. A case heard in the diocese of York in 1371 furnishes a good example of a petition brought by an unwed mother. Emmota Ripon appeared before the official (the principal judge in the court) together with William of Hexham. She "humbly asked that the same William of Hexham be condemned, compelled, and coerced to contribute to the support" of the child she alleged he had fathered.<sup>30</sup> William disputed paternity. He "replied and said that he did not know whether the child was his or not."<sup>31</sup> He admitted sexual relations

<sup>27</sup> Act books were the official records of procedure taken in the ecclesiastical courts during each court session or consistory. In them, the court scribe recorded the names of the parties, the subject matter, the action taken (*e.g.*, the introduction of documents, the production of witnesses, or the delivery of sentence), and the terms assigned for the next hearing. They were unlike modern judicial opinions, in other words, in that they were normally confined to procedure. They were intended principally for future reference for internal court purposes. Fuller explanation of the nature of the court records can be found in D. OWEN, *THE RECORDS OF THE ESTABLISHED CHURCH IN ENGLAND EXCLUDING PAROCHIAL RECORDS* (1974); R. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 7-11* (1974). An example of a particularly full record is transcribed in Donahue & Gordus, *A Case From Archbishop Stratford's Audience Act Book and Some Comments on the Book and its Value*, 2 *BULL. MEDIEVAL CANON L.* 45 (1972).

<sup>28</sup> Persons other than the mother could act for the child under the law. See, *e.g.*, BARTOLUS, *COMMENTARIA* at DIGEST 25.3.5.2, no. 3: "*Quaero an istud officium iudicis possit implorari ab alio quam a filio: Respondero quod sic quia consanguinei et alii admittuntur ad petendum alimenta pro filio.*" ("I ask whether the intervention of the judge can be sought by anyone but the son: I reply that it can, because blood relatives and others are admitted to seek sustenance for a son.") The mother was the person most closely concerned, however, and the English cases found were normally brought by the mother.

<sup>29</sup> BARTOLUS, *COMMENTARIA* at DIGEST 44.7.52, no. 1: "*Alimenta petuntur officio iudicis, quando non habet unde se alat.*" ("Sustenance is demanded by virtue of the judge's office, when [the child] does not have the means to support himself.")

<sup>30</sup> Act book M 2(1)c, f. 2r (1371): "[T]psa Emmota peciit humiliter ab eodem domino officiali prefatum Willelmum de Hexham condempnari compelli et coherceri contribuere alimentacionem dicte prolis per eundem Willelmum ut ipsa asseruit de eadem suscite."

<sup>31</sup> *Id.*: "*Willelmus respondit et dixit ipsum nescire an fuit proles sua vel non.*"



with her. But he suspected that someone else equally might be the father, "because he had been overseas and in other remote parts for a long time."<sup>32</sup> Like many such cases, this one came before the court only because the parties could not agree on the fundamental question of paternity. Emmota, however, swore a formal oath that William was the father. Having heard this, the official condemned William to pay two shillings for arrearages and to pay two pence weekly in the future toward child support. This was an interim order. The law required support to be paid until the question of paternity could be determined.<sup>33</sup> William was given an opportunity to prove that someone else was the father. The Act book, however, contains no further entry on the case. William may have acquiesced in the temporary order, or he may have settled the quarrel out of court. In either case, the court had acted to protect the child. It enforced the obligation of the putative father.

*Ex officio* prosecutions for sexual offenses provided the second forum for support orders in favor of illegitimate children. The statistical incidence of detection and prosecution of fornication and adultery in medieval England is unknowable, but pregnancies of unwed women must have brought to light many such affairs. When they did, the Church courts routinely required the father to support the child. For example, at Canterbury in 1465, Walter Tyler was prosecuted *ex officio* for fornication with Agnes Elys. He confessed. The court ordered him to undergo public penance, to provide a dowry for Agnes,<sup>34</sup> and to "cause the child to be nourished."<sup>35</sup> The Act book gives no details about what may have been a very complicated family matter. The possibility of marriage between Agnes and Walter is not mentioned; nor are the attitudes

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<sup>32</sup> *Id.*: "[D]ominus officialis interrogavit ipsum Wellelmum an ipsa Emmota fuit cum aliquo alio homine diffamata, qui dixit quod nescivit quia fuit per longa tempora in partibus transmarinis et aliis locis remotis."

<sup>33</sup> See the *glossa ordinaria* at CODE 5.25.4 s.v. *examinabit* (1582), which specifies summary procedure to determine the question of paternity but requires the father to provide interim support.

<sup>34</sup> This may be a result of the civil law rule that a daughter could be disinherited and denied a dowry by her father if she committed fornication. See CODE 3.28.19; G. DURANTIS, SPECULUM IUDICIALE IV, tit. *qui filii sint legitimi*, no. 15. There are several orders to endow in the English court records, particularly in those at Canterbury, but not enough to say with any assurance how regularly courts required the guilty man to furnish a dowry for the woman he would not marry.

<sup>35</sup> Act book X.8.3, f. 80r (1465): "*Item quod dotat mulierem. Item quod nutriri faciat prolem etc.*"

of their parents, if they had living parents. The judge made no monetary award, perhaps leaving it to negotiation between the parties and their families. Clearly, however, the Church courts did not ignore the child. They routinely imposed the burden of support on the putative father. When the woman was pregnant at the time of the prosecution, the order specified that the obligation would attach "when the time comes."<sup>36</sup> A search that has been by no means exhaustive has produced examples of support orders for illegitimate children from the ecclesiastical courts of Canterbury,<sup>37</sup> Chichester,<sup>38</sup> Lichfield,<sup>39</sup> Lincoln,<sup>40</sup> London,<sup>41</sup> Norwich,<sup>42</sup> Rochester,<sup>43</sup> St. Albans,<sup>44</sup> and York.<sup>45</sup> This list includes virtually all dioceses where any medieval records remain.<sup>46</sup> The support obligation evidently was enforced throughout England.

Whoever initiated proceedings, paternity had to be established to warrant a support order; and paternity always has presented hard problems of proof. The medieval commentators recognized that proof of paternity was "difficult and almost impossible."<sup>47</sup> Following the outlines of Roman law, they therefore adopted a two step procedure weighted slightly in favor of the child. The first step was to be handled summarily.<sup>48</sup> If access was established

<sup>36</sup> Canterbury Act book Y.I.11, f. 217r (1473): "*Et iudex iniunxit eidem quod dotaret mulierem ac nutririi faciat puerum cum tempus advenerit.*"

<sup>37</sup> *Id.*, ff. 225r (1473); 324v (1474). The largest number of support orders found in a single Act book comes from Canterbury Act book Y.I.10, ff. 180v (1473), 239v (1475), 244v (1475), 287v (1476), 291v (1477), 325c (1477), 334v (1478), 344r (1478).

<sup>38</sup> Act book Ep I/10/1, f. 92r (1509).

<sup>39</sup> Act book B/C/2/3, f. 74r (1529).

<sup>40</sup> 2 VISITATIONS IN THE DIOCESE OF LINCOLN, 1517-1531, at 15 (35 Lincoln Record Soc., A. Thompson ed. 1944).

<sup>41</sup> Act book MS. 9064/1, f. 40v (1470).

<sup>42</sup> Act book ACT/4b, f. 67r (1533).

<sup>43</sup> Act book DRb Pa 2, f. 58r (1446).

<sup>44</sup> Act book ASA 7/1, f. 8r (1516).

<sup>45</sup> Act book Cons. A B I, f. 80r (1419). See also THE ROYAL VISITATION OF 1559, at 16, 88 (187 Surtees Soc., C. Kitching ed. 1975).

<sup>46</sup> The exceptions are Hereford and Durham, from which I have found no *ex officio* proceedings. The records from both do include support cases brought at the instance of private parties, however.

<sup>47</sup> 2 J. MASCARDUS, DE PROBATIONIBUS, concl. 788, nos. 5-6 (1703).

<sup>48</sup> DIGEST 25.3.5.8; BARTOLUS, COMMENTARIA at *id.*, "*In causa alimentorum proceditur summarie, et sententia lata non facit praecudicium in causa filiacionis ordinarie exercenda.*" ("In a case about support, procedure is summary, and a sentence handed down does not create a prejudgment in a filiation case proceeding in ordinary course."). See also B. BIONDI, *supra* note 13, at 295.

and the woman named the man as the father, he was required to support the child until full hearing and determination of the claim of paternity. The courts were to accept no defendant's protest or evidence of access by other men.<sup>49</sup> Theoretically, this initial order did not prejudice the second, full hearing on the question.<sup>50</sup> The order was intended to guarantee support for the infant once the woman had made a presumptive case.

In the second hearing, the medieval commentators called for further proof. But even at that hearing, in the nature of things, proof of paternity could never reach a high level of accuracy. As a result the jurists were prepared to sanction "proof by presumptions and conjectures."<sup>51</sup> They listed the facts tending to prove filiation. Of these, sexual relations, or at least the continued opportunity for sexual relations, naturally was the most compelling. Other factors to be considered were the common fame of the community, prior admissions against interest by the father, and care for the child as one's own, even if not coupled with a claim of paternity.<sup>52</sup> Antonius de Butrio concluded that "whenever treatment [as one's child] is coupled with the opinion and fame of the neighbors, this without doubt proves and concludes filiation."<sup>53</sup> But most jurists left much to the discretion of the judge. They were content to enumerate the factors he should consider. They never accepted what has become the American rule that proof of paternity must be "clear, convincing, and satisfactory."<sup>54</sup>

The scarcity and brevity of the remaining records make it impossible to determine with assurance how closely the English Church courts followed the elaborations of the jurists. What evidence there is suggests general congruence with medieval theory, with a greater use of compurgation than the medieval treatises

<sup>49</sup> DIGEST 25.3.1.14; 37.9.1.14; CYNUS DE PISTOIA, COMMENTARIA at CODE 5.25.4, no. 4 (1578).

<sup>50</sup> DIGEST 1.6.10; 25.3.5.9; BARTOLUS, *supra* note 48.

<sup>51</sup> 2 J. MASCARDUS, *supra* note 47, concl. 788, nos. 5-6; BALDUS, COMMENTARIA at DIGEST 1.6.10, no. 2. See also R. BARBARIN, LA CONDITION JURIDIAUE DU BATARD 33 (1960); L. CREMIEU, DES PREUVES DE LA FILIATION NATURELLE NON RECONNUE (1907).

<sup>52</sup> HOSTIENSIS, SUMMA AUREA IV, tit. *qui filii sint legitimi*, no. 8 (1574); 2 J. MASCARDUS, *supra* note 47, concl. 790-92.

<sup>53</sup> COMMENTARIA IN LIBROS DECRETALIUM at X 4.17.3, no. 10: "*Dico quod quandoque concurrat tractatus cum opinione et fama vicinia, et absque dubio hic probat filiationem et concludit filiationem.*"

<sup>54</sup> See generally I S. SCHATKIN, *supra* note 3, § 3.07.

would lead one to expect. Some Church courts clearly observed the division between the initial hearing for support purposes and the later full determination of paternity. They acted summarily in the initial hearing.<sup>55</sup> At Rochester in 1456, for example, Richard Bromlegh was prosecuted for fornication with Agnes Malemete, who had given birth to a child. He admitted fornication; he denied paternity. "And as for the procreation of the child, he said that the woman was defamed with other persons, and therefore he doubts the fathering."<sup>56</sup> The judge, noting this plea, nevertheless made a summary order. Bromlegh "was warned to pay two pence weekly for support of the child until it should be established [that there was] another father."<sup>57</sup> Such summary disposition was the pattern. The *exceptio plurium concubentium*, denying support where other men have had sexual relations with the mother, was not an absolute bar to support, as many American courts were subsequently to hold.<sup>58</sup> In some cases the woman was obliged to find compurgators, that is, neighbors who would swear they believed her oath, to support her claim.<sup>59</sup> But if she did, the court made the initial support order envisioned by Roman law and adopted by the medieval commentators.

About the second, full determination of paternity less can be said. Virtually all the evidence comes from the initial hearings. Only one case, a filiation proceeding from Lichfield in 1529, has survived to show that evidence of common fame and the man's treatment of the child as his own was introduced.<sup>60</sup> An initial

<sup>55</sup> The cases almost invariably reach a conclusion in one or at the most two court sessions; e.g., Canterbury Act book X.8.3, f. 14r (1463), the record of a case in which the man was ordered to appear on July 4. He did not appear on that day but did appear on July 27, when a support order was entered against him.

<sup>56</sup> Act book DRb Pa 3, f. 521r (1456): "*Et quoad proliis procreationem, dicit quod mulier est diffamata de aliis personis et ideo dubitat de genitura sua.*"

<sup>57</sup> *Id.*: "[T]amen monitus est quod solvat ad alimentationem proliis ii d. qualibet septimana quousque constiterit de alio genitore."

<sup>58</sup> On this defense, see H. CLARK, *supra* note 5, § 5.3, at 167. Its checkered career in civil law countries is interestingly sketched in Scholtens, *Maintenance of Illegitimate Children and the Exceptio Plurium Concubentium*, 72 S. AFR. L.J. 144 (1955).

<sup>59</sup> Hereford Act book I/12 s.d. 22 March 1583; Lichfield Act book B/C/2/3, f. 74r (1529); Norwich Act book ACT/4b, f. 67r (1533); York Act book M 2(1)c, f. 2r (1371).

<sup>60</sup> Lichfield Act book B/C/2/3, f. 57r (1529), in which a master of a girl living in his house was said to have fathered her child. One of the questions put to the witnesses was whether the master had ever "caused the boy to be supported." There is also some evidence as to proof of filiation in CHILD-MARRIAGES, DIVORCES AND RATIFICATIONS, ETC.

hearing, followed by a realistic assessment of the situation and a compromise in light of that assessment, may have been all that was necessary in most cases. Much negotiation and discussion must have lain behind the bare notations of the Act books. The canon law permitted compromise of questions involving support, and the evidence suggests that judges and litigants took advantage of the permission.<sup>61</sup> Judges, in fact, allowed settlement of suits over child support often enough to imply that they actively promoted settlement, at least settlement under their broad supervision.<sup>62</sup>

Similarly, little can be discovered about the size and duration of the support order. But indefiniteness was the natural result of the law. So closely linked was the order to the needs of the child and to the ability of the father to pay, so hesitant was the law to set any minimum limit to the obligation, that few fixed rules could be enforced in practice.<sup>63</sup> The canonist Joannes Andreae (d. 1348), for example, noted only that the father must support the child according to his means, and that the obligation ceased when the child had means to support himself.<sup>64</sup> There was no fixed table of awards. What gloss civilians and canonists gave to the subject concerned the general types of expenses that the obligation encompassed. It included food, shelter, and clothing. But it did not include payment of the child's debts.<sup>65</sup> Whether it covered payment for medicine was open to academic controversy, the predominant

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IN THE DIOCESES OF CHESTER, A.D. 1561-6, at 85-102 (108 Early Eng. Text Soc., F. Furnivall ed. 1897).

<sup>61</sup> DIGEST 2.15.8. Compromise seems to have been allowed in Roman law even without the consent of the magistrate, except for future rights to *alimenta* bequeathed in a will. See, e.g., G. DURANTIS, SPECULUM IUDICIALE IV, tit. *qui filii sint legitimi*, no. 27: "*Sed quaeritur utrum super alimentis transigi posset, et licet ista sint in Summa Azonis tacta, nota tamen quod de praeteritis potest transigi indistincte, . . . et etiam de futuris, nisi sint in ultima voluntate relicta.*" ("But it is asked whether there can be compromise about support, and although these matters are dealt with in the Summa of Azo, note nevertheless that over past support compromise is always permitted, . . . and even over future support unless it has been left in a last will.")

<sup>62</sup> E.g., Chichester Act books Ep. I/10/1, f. 140r (1511), a support case committed to arbitration; and Ep I/10/5, f. 37r (1534), a support case in which formal proceeding was adjourned "in hopes of concord." ("*sub spe concordie*").

<sup>63</sup> DIGEST 25.3.5.7; HOSTIENSIS, LECTURA at X 4.7.5, nos. 7-8. There is a fairly full discussion of the point in 5 ALEXANDER DE IMOLA, CONSILIA 55 (cons. 72, nos. 9-12) (1549).

<sup>64</sup> COMMENTARIA at X 4.7.5, nos. 7, 9 (1581).

<sup>65</sup> DIGEST 25.3.5.14-16; DIGEST 34.1.6; W. LYNWOOD, PROVINCIALE SEU CONSTITUTIONES ANGLIAE 255 s.v. *alimenta* (1679). See also I P. BONFANTE, *supra* note 14, at 380; L. CREMIEU, *supra* note 51, at 45.

opinion apparently being that it did.<sup>66</sup> Baldus de Ubaldis (d. 1400) gave the broadest meaning to the obligation. "Let the term *alimenta* be [taken] liberally for all things necessary to life."<sup>67</sup>

Given this discretionary standard, the judges must have varied the size of their support orders to take account of individual circumstances, although in practice they rarely made large awards. The Act books do not suggest generosity. The amount of support varied from one penny per week (Rochester, 1347)<sup>68</sup> to six pence (York, 1374).<sup>69</sup> Two pence per week is the sum mentioned most often in the remaining records, and this amount even into the early sixteenth century.<sup>70</sup> Most entries, however, specified no exact amount at all. The order of the court, and the undertaking of the father, was simply to provide the child's sustenance.

The duration of the obligation also varied. The court records describe orders lasting until the child reached the age of three<sup>71</sup> and the age of seven,<sup>72</sup> but these may have been meant as interim orders subject to revision. Typically the entry required support "until [the child] should come to legitimate age."<sup>73</sup> A few cases may have adopted the civilian rule that a child was to be nourished by the mother until age three, by the father afterwards,<sup>74</sup> but the number does not establish a clear rule of practice. What the records do suggest is the exercise of judicial discretion and the use of

<sup>66</sup> G. DURANTIS, SPECULUM IUDICIALE IV, tit. *qui filii sint legitimi*, no. 38: "*Sed nunquid is qui praestare tenetur alimenta praestabit et medicinas cum aegrotatur? Dicunt quidam quod sic, . . . alii distinguunt, . . . Sed primum verius.*" ("But will one who is obligated to support also be obligated to supply medicine when there is illness? Some say that he is, . . . others make a distinction. But the first position is more correct.")

<sup>67</sup> COMMENTARIA at Code 5.10.1, no. 9: "[A]ppellatio alimentorum larga sit pro omnibus ad vitam necessariis." See DIGEST 50.16.43.

<sup>68</sup> REGISTRUM HAMONIS HETHE 951 (48 Canterbury & York Soc., C. Johnson ed. 1948).

<sup>69</sup> Act book M 2(1)c, f. 18v (1374); another example is Chichester Act book Ep I/10/1, f. 92r (1509).

<sup>70</sup> York Act book Cons. A B 6, f. 196v (1511); Norwich Act book ACT/1, f. 162v (1511). It is difficult to give an accurate assessment of the buying power of these sums. The average cost of a hen, for instance, was 1 5/8d. in 1347; 2d. in 1374, and 2 1/4d. for the period 1400-1540. But the cost of most agricultural products: wheat, barley, and the like, fluctuated greatly. See 1 J. ROGERS, A HISTORY OF AGRICULTURE AND PRICES IN ENGLAND 226-35 (1866 repr. 1963); 4 *id.*, 282-91.

<sup>71</sup> Canterbury Act book Y.1.2, f. 103v (1398); Lichfield Act book B/C/2/3, f. 213r (1533).

<sup>72</sup> York Act book M 2(1)c, f. 18v (1374).

<sup>73</sup> *E.g.*, Lichfield Act book B/C/2/3, f. 38v (1528): "*usque ad etatem legitimam pervenerit.*"

<sup>74</sup> Canterbury Act book Y.4.1, f. 40v (1540); Norwich Act book ACT/1, f. 162v (1511); cases cited at note 71 *supra*.

private arrangement. Since the law envisioned an obligation coterminous with legitimate need, that is what we should expect.

If the available records are representative, inability to pay was the only defense offered by fathers once the question of paternity had been settled. Poverty was, of course, a possible plea under the law. In 1374 a Canterbury judge accepted such a defense, presumably after determining its truth. He nevertheless ordered the father to take up the obligation again "when he should come to more plentiful fortune."<sup>75</sup> One case, heard at Rochester in 1463, illustrates a court's readiness to provide support. Geoffrey Steyn was convicted of fathering the illegitimate child of Agnes Jays. He pleaded insufficiency of assets. "He had nothing in goods except by the grace and will of his father."<sup>76</sup> The court accepted this plea, but the judge "asked and induced Henry Steyn the father [of Geoffrey] to provide for the care of the aforesaid child" until better arrangements could be made.<sup>77</sup>

Seven years before the case involving Steyn, the Rochester court had dealt with a similar situation. Apparently the father could not pay; neither could the mother. But Joan Marot, the sister of the mother, and her husband were "willing to take the entire burden of maintenance upon themselves and to support the child from their own resources."<sup>78</sup> The court approved the arrangement. Such entries reflect the only theme running consistently through the cases: the concern that someone, and someone related to the child, take up the obligation to support. Normally, responsi-

<sup>75</sup> Act book Y.1.1, f. 83r (1374). A slightly later *causa alimentationis prolis* from Canterbury, recorded in Deposition book X.10.1, f. 33r (1413), includes a witness's description of the defendant: "*Habet ad sustentacionem suam vix valorem duarum marcarum annuatim de bonis propriis; habuit tamen ad medium annum hinc elapsum et ea alienavit matri sue.*" ("Out of his own goods he has barely two marks a year for his sustenance; however he had [goods] half a year ago and he alienated them to his mother.")

<sup>76</sup> Act book DRb Pa 3, f. 466r (1463): "*Et vir dicit quod nichil habet in bonis nisi de gracia et voluntate patris sui.*"

<sup>77</sup> *Id.*: "*Et commissarius rogavit et induxit Henricum Steyn' patrem genitoris dicte prolis ad disponendum pro conservatione prolis predictae quousque clarius constare et melius poterit pro sustentatione eiusdem et exhibitione providere.*" In a case recorded in Lichfield Act book B/C/2/1, f. 74v (1526), the grandfather intervened, apparently voluntarily, to take up his son's obligation.

<sup>78</sup> Act book DRb Pa 2, f. 282v (1456): "[I]psi vellent totum exhibicionis onus in se suscipere et dictum prolem exhibere sumptibus suis." As part of the same proceedings, Thomas Maynard and William Grenehill agreed not to attempt to draw the children away from the house of Joan and her husband.

bility fell on the father. But if the father could not offer support, someone else should be found. This regime is the very opposite of the notion, so often said to have characterized medieval England, that the illegitimate child was *filius nullius*.

Identifying a person obliged to support a child, of course, was not always the end of the matter. Modern practice abundantly shows the difficulty of enforcing a continuing obligation that has no possibility of return.<sup>79</sup> The problem is not new. Many of the Act book entries involve claims for arrearages, fathers who had "fallen behind" in their payments. Perhaps encouraged by the canon law rule that relative need had a legitimate place in determining the scope of the obligation, the fathers had not met this obligation for long enough to bring the mother to the point of suing.<sup>80</sup> Suits occurred often enough to suggest that enforcement of support orders was a continuing problem.

The principal sanction available to the Church courts to secure enforcement was excommunication. In medieval society that spiritual penalty entailed a considerable loss of civil and religious rights.<sup>81</sup> Excommunication might even eventually result in a defaulting party's imprisonment.<sup>82</sup> But in assessing the nature of the enforcement in the Church courts, one should note that the judges did not rely on the threat of penal sanction alone. When a hearing was adjourned for attempts at arbitration and agreement, the ecclesiastical officials tried, whenever they could, to induce the defendant to agree voluntarily to pay support at a level acceptable to both himself and to the court.<sup>83</sup> Defendants often took solemn

<sup>79</sup> See W. GOODE, AFTER DIVORCE 221 (1956); Chambers, *The Child-Support Enforcement Process Study*, in C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 850-56 (2d ed. 1976).

<sup>80</sup> E.g., Canterbury Act book Y.I.2, f. 103v (1398), in which Nicholas Barbour was condemned to pay 9s.4d. "*pro custodia prolis per xxvii ebdomadas elapsas*," ("for custody of the child for twenty-seven weeks past.")

<sup>81</sup> There is a summary of the disabilities in 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 630-32 (7th ed. 1956).

<sup>82</sup> Imprisonment was possible through the use of the English Church's privilege of "signifying" an unrepentant excommunicate to the Chancery and requiring that the sheriff imprison him. I found one threat of signification in a *causa alimentacionis prolis* in the remaining records: Canterbury Act book Y.I.1, f. 3v (1372). On the subject generally, see F. LOGAN, EXCOMMUNICATION AND THE SECULAR ARM IN MEDIEVAL ENGLAND; A STUDY IN LEGAL PROCEDURE FROM THE THIRTEENTH TO THE SIXTEENTH CENTURY (1968).

<sup>83</sup> E.g., Canterbury Act book X.8.I, f. 33r (1401): "*Et monitus est ad concordandum cum matre pro invencione filii*." ("And he was ordered to reach agreement with the



oaths to fulfill the obligation, a practice indicating that the Church court judges wanted the obligation undertaken as willingly as possible.<sup>84</sup> Support of one's child was an essentially moral duty. Acknowledgement of the duty and agreement, even reluctant agreement, to fulfill it played a regular part in Church court procedure. The judges used both conciliation and penal sanction to enforce support orders for illegitimate children. That the combination did not always ensure continued payment is testimony to a stubborn and familiar fact of human nature.

### III. CONCLUSION

The Elizabethan Poor Law of 1576 empowered Justices of the Peace to compel parents to provide for the sustenance of their illegitimate children. Reciting the burden to parish funds caused by illegitimates, the Statute allowed the Justices to require payment for child support "in such wise as they shall think meet and convenient."<sup>85</sup> The Statute traditionally has been treated as if it created a new duty.<sup>86</sup> That treatment is clearly incorrect. The Statute simply provided a new mechanism for enforcing a duty previously enforced only in the courts of the Church. The enforcement mechanism adopted by the secular courts did include some new features, suretyship guarantees to insure payment, for example. But much of the Statute merely provided for continuation in a new forum of earlier practice. The summary determinations of paternity and the immediate support orders, for instance, followed ecclesiastical procedure closely.<sup>87</sup>

The Statute, therefore, should be seen principally as part of the great movement of religious and social change in sixteenth century

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mother for the support of the son."). Other instances: Canterbury Act book Y.I.4, f. II2r (1423); X.8.3, f. 14r (1463); Durham Act book III/1, f. 23 (1532); Rochester Act book DRb Pa 2, ff. 167r (1451); *id.*, f. 183r (1452); cases cited at note 62 *supra*.

<sup>84</sup> *E.g.*, Canterbury Act book Chartae Antiquae A 36 II, f. 28r (1329): "*Willelmus Tenturer ad sancta dei Evangelia corporale prestitit iuramentum quod solveret pro sustentacione Mariote filie sue . . .*" ("William Tenturer swore an oath on the Holy Gospels to pay for the sustenance of Mariota his daughter . . .").

<sup>85</sup> 18 Eliz. 1, c. 3, § 1 (1576).

<sup>86</sup> *See, e.g.*, I I. PINCHBECK & M. HEWITT, *supra* note 8, at 206; Robbins & Deák, *supra* note 8, at 317; Comment, *Support of Children Born out of Wedlock: Virginia at the Crossroads*, 18 WASH. & LEE L. REV. 343, 344 (1961).

<sup>87</sup> *See, e.g.*, SUSSEX QUARTER SESSIONS ORDER BOOK, 1642-1649, at 85, 127 (54 Sussex Rec. Soc., B. Redwood ed. 1954).

England. That century redrew the boundary between the spheres of secular and spiritual obligation. To enforce a father's obligation to care for his illegitimate children by secular sanction, the result of the Statute, was to move the duty from one side of the boundary to the other and to recognize that an ecclesiastical remedy was no longer enough. A decline in the habits of obedience to the decrees of the Church courts required a new source of protection for the illegitimate child.<sup>88</sup> But the Statute marked no change in the substantive rights of that child. He had been entitled to support from his father as far back as the records yield reliable evidence.

The 1576 Statute itself did not restrict the Church's rights. It did not purport to oust ecclesiastical jurisdiction. Like much Elizabethan legislation, it merely offered an alternate remedy.<sup>89</sup> In fact, the Church courts continued to issue support orders at least for a time after 1576.<sup>90</sup> At some later point, however, the ecclesiastical remedy fell into desuetude. Only secular sanction was effective enough to be worth invoking. By Blackstone's day the secular action had become the sole remedy.<sup>91</sup> The old ecclesiastical jurisdiction was forgotten. Its disappearance left the impression that, prior to enactment of the Statute, an illegitimate child had no legal recourse against his father for support.

From this vantage point American lawyers drew the not unreasonable, but false, conclusion that at the time the common law developed, English courts imposed no legal duty on a father to support his illegitimate children. American courts therefore adopted what they supposed to have been the common law regime. Without the statute, the conclusion seemed inescapable. Unfortunately, this conclusion caused, indeed may continue to cause, a measure of hardship to illegitimate children. Of course, today American courts

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<sup>88</sup> See generally C. HILL, *ECONOMIC PROBLEMS OF THE CHURCH: FROM ARCHBISHOP WHITGIFT TO THE LONG PARLIAMENT* (1956); Houlbrooke, *The Decline of Ecclesiastical Jurisdiction Under the Tudors*, in *CONTINUITY AND CHANGE* 239 (R. O'Day & F. Heal eds. 1976).

<sup>89</sup> Other examples: 1 Eliz. 1, c. 2, § 4 (1558-59) (church attendance); 5 Eliz. 1, c. 9, § 5 (1563) (perjury); 13 Eliz. 1, c. 8, § 8 (1571) (usury). This fact may affect our estimate of the purpose of the Act, normally said to encompass only saving parish funds, not concern for the child's welfare. The desire not to challenge the rights of the Church directly may explain at least in part the Statute's failure to mention what had been the chief reason for the Church's jurisdiction, provision of support for the illegitimate child.

<sup>90</sup> E.g., Lichfield Act book B/C/2/26 s.d. 16 June 1590; Hereford Act book I/11 s.d. 25 July 1577.

<sup>91</sup> See 1 W. BLACKSTONE, *COMMENTARIES* \* 458.

and legislatures have in large measure granted to illegitimate children a legal right to parental support.<sup>92</sup> They have consciously, sometimes stridently, rejected the common law rule in order to reach that result. Ironically, in so doing, they have in fact adopted the regime of the age in which the common law was born.

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<sup>92</sup> In 1966, one commentator noted that all but three states (Idaho, Missouri, and Texas) had provisions to compel a father to support his illegitimate child. Note, *STAN. L. REV.*, *supra* note 6, at 860. After *Gomez v. Perez*, 409 U.S. 535 (1973), however, a state may not discriminate between legitimate and illegitimate children for purposes of support.